ARTICLE 29
GRIEVANCE PROCEDURE

Section

Cross References. Whistle-blower law, §§ 6C-1-1 et seq.

Grievance procedure for state employees, §§ 29-6A-1 et seq.

W. Va. Law Review. "Survey of Developments in West Virginia Law: 1985," 88 W. Va. L. Rev. 293 (1985).

Van Tol, "Crisis in Higher Education Governance: One State's Struggle for Excellence," 91 W. Va. L. Rev. 1 (1989).

Legislative intent. - The grievance procedures set out in this article are to be given a flexible interpretation in order to carry out the legislative intent. Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992).

Intervenor in proceeding. - An intervenor in a grievance proceeding under this article may make affirmative claims for relief as well as assert defensive claims. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

Limit on claims of intervenor. - A hearing examiner in a grievance proceeding under this article may for good cause and in the cautious exercise of the examiner's discretion limit the claims that an intervenor may make; however, such limitations must be imposed in a fashion that will not unfairly prejudice the rights of the intervenor to have a proper determination made on the merits of his or her claims. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

Entitlement to hearing. - In the absence of any evidence of bad faith, a grievant who demonstrates substantial compliance with the filing provisions contained in §§ 18A-2-8 and 18-29-1 et seq. is entitled to the requested hearing. Duruttya v. Board of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989); Fayette County Bd. of Educ. v. Lilly, 184 W. Va. 688, 403 S.E.2d 431 (1991); Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

Standard of review. - A final order of the hearing examiner for the West Virginia educational employees grievance board, made pursuant to this article and based upon findings of fact, should not be reversed unless clearly wrong. Hare v. Randolph County Bd. of Educ., 183 W. Va. 436, 396 S.E.2d 203 (1990); Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Ohio County Bd. of

Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995); Bolyard v. Kanawha County Bd. of Educ., 194 W. Va. 134, 459 S.E.2d 411 (1995); Putnam County Bd. of Educ. v. Andrews, 198 W. Va. 403, 481 S.E.2d 498 (1996); Hazelwood v. Mercer County Bd. of Educ., 200 W. Va. 205, 488 S.E.2d 480 (1997); Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997); Keatley v. Mercer County Bd. of Educ., 200 W. Va. 487, 490 S.E.2d 306 (1997).

Damages - A board of education that in good faith hires an employee is not subject to civil action for damages for breach of contract by that employee when it is thereafter determined as a result of the grievance process established by this article that another individual should have been placed in that position. Copley v. Mingo County Bd. of Educ., 195 W. Va. 480, 466 S.E.2d 139 (1995).

Applied in West Va. Alcohol Beverage Control Admin. v. Scott, 205 W. Va. 398, 518 S.E.2d 639 (1999), *this is a per curiam opinion.*

Stated in Smith v. Board of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985); Graf v. Frame, 177 W. Va. 282, 352 S.E.2d 31 (1986); Board of Educ. v. DeFazio, 180 W. Va. 614, 378 S.E.2d 656 (1989).

Cited in Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988); Weimer-Godwin v. Board of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988); Staton v. Hrko, 180 W. Va. 654, 379 S.E.2d 159 (1989); Bright v. Tucker County Bd. of Educ., 184 W. Va. 33, 399 S.E.2d 176 (1990); Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Kincell v. Superintendent of Marion County Schools, 499 S.E.2d 862 (W. Va. 1997); Kanawha County Bd. of Educ. v. Hayes, 500 S.E.2d 547 (W. Va. 1997); University of W. Va. Bd. of Trustees ex rel. W. Va. Univ. v. Graf, 205 W. Va. 118, 516 S.E.2d 741 (1999), *this is a per curiam opinion.*

18-29-1. Legislative purpose and intent.

The purpose of this article is to provide a procedure for employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers and their employer or agents of the employer to reach solutions to problems which arise between them within the scope of their respective employment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served. This procedure is intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level and shall be construed to effectuate this purpose. Nothing herein shall prohibit the informal disposition of grievances by stipulation or settlement agreed to in writing by the parties, nor the exercise of any hearing right provided in article two [§§ 18A-2-1 et seq.], chapter eighteen-a of this code or any other section of chapter eighteen or eighteen-a [§§ 18-1-1 et seq. or §§ 18A-1-1 et seq.] of this code: Provided, That employees of the governing boards of higher education or of state institutions of higher education shall have the option of filing grievances in accordance with the provisions of this article or in accordance with the provisions of policies and rules of the governing boards of higher education regarding such employees. Any board decision pursuant to such sections may be appealed in accordance with the provisions of this article unless otherwise provided in such section.

[1985, c. 71; 1992, c. 62.]

Legislative intent. - The legislature did not intend the grievance process to be a procedural quagmire where the merits of the cases are forgotten. In many instances, the grievant will not have a lawyer;

therefore, the process should remain relatively simple. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

The legislative intent expressed in this section is to provide a simple, expeditious, and fair process for resolving problems. Fayette County Bd. of Educ. v. Lilly, 184 W. Va. 688, 403 S.E.2d 431 (1991); Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992); Vest v. Board of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995);.

Baker v. Board of Educ., - W. Va. - , 534 S.E.2d 378 (W. Va. 2000).

Doctrine of exhaustion. - The doctrine of exhaustion of administrative remedies is inapplicable where resort to available procedures would be an exercise in futility. Fayette County Bd. of Educ. v. Lilly, 184 W. Va. 688, 403 S.E.2d 431 (1991).

Grievance bars action for mandamus. - When an individual is adversely affected by an educational employment decision rendered pursuant to § 18A-4-7a, he or she may obtain relief in one of two ways: he or she may request relief by mandamus as permitted under that section or, in the alternative, he or she may seek redress through the educational employees' grievance procedure; once an employee chooses one of these courses, he or she is constrained to follow that course to its finality and is precluded from pursuing the other course. Ewing v. Board of Educ., 503 S.E.2d 541 (W. Va. 1998).

Findings of fact. - A final order of the hearing examiner for the West Virginia educational employees grievance board, made pursuant to this act, and based upon findings of fact, should not be reversed unless clearly wrong. West Virginia Dep't of Health & Human Resources/Welch Emergency Hosp. v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Surber v. Mingo County Bd. of Educ., 195 W. Va. 279, 465 S.E.2d 381 (1995); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Watts v. West Virginia Dep't of Health & Human Resources/Division of Human Servs., 195 W. Va. 430, 465 S.E.2d 887 (1995); Cahill v. Mercer County Bd. of Educ., 195 W. Va. 453, 465 S.E.2d 910 (1995); Cahill v. Mercer County Bd. of Educ., - W. Va. - , 539 S.E.2d 437 (W. Va. 2000).

Appellate review. - A final order of the hearing examiner for the West Virginia educational employees grievance board, made pursuant to §§ 18-29-1 et seq. and based upon findings of fact, should not be reversed unless clearly wrong. Butcher v. Gilmer County Bd. of Educ., 189 W. Va. 253, 429 S.E.2d 903 (1993); Quintrell v. Lincoln County Bd. of Educ., 195 W. Va. 347, 465 S.E.2d 618 (1995).

Baker v. Board of Educ., - W. Va. - , 534 S.E.2d 378 (W. Va. 2000).

Where bus driver was alleged to have smoked on the school bus and the administrative law judge resolved conflicting evidence in favor of the driver, the circuit court improperly reversed; thus, case was remanded for reinstatement of the decision in favor of the driver by the grievance board. Board of Educ. v. Johnson, 497 S.E.2d 778 (W. Va. 1997).

Grievance - Duty to file - When there is a misinterpretation or misapplication of a statute involving school personnel, the employee affected by the misinterpretation or misapplication of the law has no duty to file a grievance until the misinterpretation or misapplication occurs. State ex rel. Monk v. Knight, 499 S.E.2d 35 (W. Va. 1997).

Grievance - Timeliness of hearing - Substitute teacher substantially complied with the grievance procedure where he spoke with the director of personnel and filed a grievance with the principal of the school where the event he complained of occurred; thus, he was entitled to default judgment where he did not receive a hearing in two years. State ex rel. Catron v. Raleigh County Bd. of Educ., 496 S.E.2d 444 (W. Va. 1997).

Grievance - Dismissed - Hearing examiner correctly dismissed grievance because school board complied with the termination procedures of § 18A-2-6. Lucion v. McDowell County Bd. of Educ., 191 W.

Va. 399, 446 S.E.2d 487 (1994).

Applied in Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991); Barthelemy v. West Virginia Div. of Cors., - W. Va. - , 535 S.E.2d 201 (W. Va. 2000).

Quoted in Akers v. West Virginia Dep't of Tax & Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995).

Cited in Randolph County Bd. of Educ. v. Scalia, 182 W. Va. 289, 387 S.E.2d 524 (1989); Bledsoe v. Wyoming County Bd. of Educ., 183 W. Va. 190, 394 S.E.2d 885 (1990); Hare v. Randolph County Bd. of Educ., 183 W. Va. 436, 396 S.E.2d 203 (1990); Brown v. Wood County Bd. of Educ., 184 W. Va. 205, 400 S.E.2d 213 (1990); West Virginia Univ. v. Sauvageot, 185 W. Va. 534, 408 S.E.2d 286 (1991); Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992); Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994); Hanlon v. Logan County Bd. of Educ., 496 S.E.2d 447 (W. Va. 1997); Barazi v. West Virginia State College, 498 S.E.2d 720 (W. Va. 1997); Board of Trustees v. Reece, 502 S.E.2d 186 (W. Va. 1998); Board of Educ. v. Smith, 502 S.E.2d 214 (W. Va. 1998), *this is a per curiam opinion*; Ewing v. Board of Educ., 503 S.E.2d 541 (W. Va. 1998); Woo v. Board of Educ., 504 S.E.2d 644 (W. Va. 1998); Stapleton v. Board of Educ., 204 W. Va. 368, 512 S.E.2d 881 (1998); Wheeling-Pittsburgh Steel CCrp. v. Rowing, 205 W. Va. 286, 517 S.E.2d 763 (1999); Board of Educ. v. Owensby, 206 W. Va. 600, 526 S.E.2d 831 (1999); Maikotter v. University of W. Va. Bd. of Trs., 206 W. Va. 691, 527 S.E.2d 802 (1999); Flint v. Board of Educ., - W. Va. - , 531 S.E.2d 76 (W. Va. 1999), *this is a per curiam opinion*; Mercer County Board of Educ. v. Townsend, - W. Va. - , 531 S.E.2d 664 (W. Va. 2000).

18-29-2. Definitions.

For the purpose of this article:

(a) "Grievance" means any claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

A grievance may be filed by one or more employees on behalf of a class of similarly situated employees: Provided, That any similarly situated employee shall indicate in writing of his or her intent to join the class of similarly situated employees. Only one employee filing a grievance on behalf of similarly situated employees shall be required to participate in the level one hearing required in section four [§ 18-29-4] of this article.

Any pension matter or other issue relating to the state teachers retirement system in accordance with article seven-a [§§ 18-7A-1 et seq.] of this chapter or other retirement system administered outside the jurisdiction of the applicable governing board, any matter relating to public employees insurance in accordance with article sixteen [§§ 5-16-1 et seq.], chapter five of this code, or any other matter in which authority to act is not vested with the employer shall not

be the subject of any grievance filed in accordance with the provisions of this article.

(b) "Days" means days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings in accordance with section two [§ 18A-5-2], article five, chapter eighteen-a of this code.

(c) "Employee" means any person hired as a temporary, probationary or permanent employee by an institution either full or part time. A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.

(d) "Grievant" means any named employee or group of named employees filing a grievance as defined in subsection (a) of this section.

(e) "Institution" means any state institution of higher education, the governing boards of higher education, any institution whose employees are hired by the state board of education including the department of education, and any public school, regional educational service agency or multi-county vocational center.

(f) "Employer" means that institution contracting the services of the employee.

(g) "Immediate supervisor" means that person next in rank above the grievant possessing a degree of administrative authority and designated as such in the employee's contract, if any.

(h) "Chief administrator" means, as may be applicable, the president of a state institution of higher education, the chancellor of a governing board of higher education only as to those employees employed solely by the chancellor and governing board and not assigned to a state institution of higher education, the senior administrator as to those employees hired pursuant to section two [§ 18B-4-2], article four, chapter eighteen-b of this code, the state superintendent of schools as to employees hired by the state board of education, the county superintendent, the executive director of a regional educational service agency or the director of a multi-county vocational center.

(i) "Governing board" means the administrative board of any state or county educational institution, including institutions whose employees are hired by the state board of education, and refers, as is applicable, to the governing boards of higher education, state board of education, county boards of education, the school board members of any board of directors of a regional educational service agency or the school board members of any administrative council of a multi-county vocational center.

(j) "Grievance evaluator" means that individual or governing board authorized to render a decision on a grievance.

(k) "Board" means the education employees grievance board.

(*l*) "Hearing examiner" means the individual or individuals employed by the board in

accordance with section five [§ 18-29-5] of this article.

(m) "Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

(n) "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.

(o) "Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

(p) "Reprisal" means the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.

(q) "Employee organization" means any employee advocacy organization whose membership includes employees as defined in this section which has filed with the board the name, address, chief officer and membership criteria of the organization.

(r) "Representative" means any employee organization, fellow employee, legal counsel or other person or persons designated by the grievant as the grievant's representative.

[1985, c. 71; 1992, c. 62.]

Extent of board's powers. - The grievance board's authority extends only to resolving grievances made cognizable by its authorizing legislation, that is, those grievances recognized in this section. Vest v. Board of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

The West Virginia education and state employees grievance board can entertain grievances claiming that a particular employment action was the result of discrimination based on sex or any of the other prohibited motivations listed in the Human Rights Act. Vest v. Board of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Applicability to Human Rights Act. - The West Virginia education and state employees grievance board does not have authority to determine liability under the West Virginia Human Rights Act, §§ 5-11-1 et seq.; nevertheless, the grievance board's authority to provide relief for employees for "discrimination," "favoritism," and "harassment," as those terms are defined in this section, includes jurisdiction to remedy discrimination that also would violate the Human Rights Act. Vest v. Board of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

A civil action filed under the West Virginia Human Rights Act, §§ 5-11-1 et seq., is not precluded by a prior grievance decided by the West Virginia education and state employees grievance board arising out of the same facts and circumstances. Vest v. Board of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

There is no authority in the statute for the West Virginia education and state employees grievance board to decide whether a person states a claim under the Human Rights Act. Vest v. Board of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Grievance - Duty to file - When there is a misinterpretation or misapplication of a statute involving school personnel, the employee affected by the misinterpretation or misapplication of the law has no duty to

file a grievance until the misinterpretation or misapplication occurs. State ex rel. Monk v. Knight, 499 S.E.2d 35 (W. Va. 1997).

Grievance - Timeliness of hearing - Substitute teacher substantially complied with the grievance procedure where he spoke with the director of personnel and filed a grievance with the principal of the school where the event he complained of occurred; thus, he was entitled to default judgment where he did not receive a hearing in two years. State ex rel. Catron v. Raleigh County Bd. of Educ., 496 S.E.2d 444 (W. Va. 1997).

Jurisdiction. - The jurisdiction of the Education and State Employees Grievance Board was limited to the resolution of grievances as defined by § 29-6A-2 and this section, and the grievance board did not have jurisdiction to order the appellant to implement shift trading policies. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997).

Prima facie case. - A plaintiff can establish a prima facie case of intentional salary discrimination if she proves that she is a member of a protected class and that she receives a lower salary than an individual who is not a member of the plaintiff's class and who is similarly situated to the plaintiff in terms of experience and comparability of job content. The employer may rebut the inference by coming forward with some legitimate explanation for the salary discrepancy. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

In order to establish a prima facie case of discrimination or favoritism under this section, a grievant must establish the following: (1) that he is similarly situated, in a pertinent way, to one or more other employees; (2) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him; and (3) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference. Flint v. Board of Educ., - W. Va. - , 531 S.E.2d 76 (W. Va. 1999), *this is a per curiam opinion.*

Discrimination not found. - Teacher being transferred because the newly appointed principal was his wife was not being discriminated against because of his marital status, but was being transferred because of his personal relationship with the newly appointed principal. Townshend v. Board of Educ., 183 W. Va. 418, 396 S.E.2d 185 (1990).

Board of education policy prohibiting one spouse from supervising the other spouse within a county school system did not deny teacher the right to marry, but did deny him the right to be a teacher under the supervision of his wife. Townshend v. Board of Educ., 183 W. Va. 418, 396 S.E.2d 185 (1990).

Continuing violation. - In female employee's sexual discrimination claim, "continuing violation" analysis was applicable, so that the plaintiff's grievance was timely filed as to any salary disparity between her and male employee that existed within the fifteen-day statutory period preceding the filing of her grievance and thereafter, and if the plaintiff proved the discrimination, she would be entitled to be made whole retroactive to fifteen days preceding the filing of the grievance, and to receive prospective relief. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Other employees not similarly situated. - While the code requires uniformity in salaries, benefits, etc., for those employees who are performing "like assignments and duties," obviously, employees who do not have the same classifications are not performing "like assignments and duties" and the discrimination and favoritism provisions in this section do not bar a school board from employing such employees on different terms. Flint v. Board of Educ., - W. Va. - , 531 S.E.2d 76 (W. Va. 1999), *this is a per curiam opinion.*

Issue preclusion. - A civil action filed under the Human Rights Act is not precluded by a prior grievance decided by the West Virginia education and state employees grievance board arising out of the same facts and circumstances. The grievance procedures and the Human Rights Act provide enforcement mechanisms to accomplish different legislative purposes and neither preempts the other. Vest v. Board of

Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

A grievance asserting that there was a present violation of § 18A-4-5b because the board of education was not providing uniform vacation benefits to its employees was timely where the alleged violation continued up until the date of the filing; the grievance was timely because the board's failure to provide uniform contracts to similarly situated employees, although a practice that had begun some years before, constituted a continuing practice. Flint v. Board of Educ., - W. Va. - , 531 S.E.2d 76 (W. Va. 1999), *this is a per curiam opinion.*

Burden of proof. - A "discrimination" claim under subsection (m) only need establish that the adverse employment decision was neither job related nor agreed to by the employees; subsection (m) imposes no requirement for proving that the "discrimination" was caused by an illicit motive or was the result of a discriminatory policy having a disparate impact, as would be the case under the Human Rights Act. Vest v. Board of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Motive. - A nonsensical and arbitrary justification for disparate treatment seriously undercuts an employer's claim that it did not rely on a forbidden motive and tends to show that the purported justification was pretextual. Still, it is possible for an employer to act arbitrarily without an illicit motive, and the court has a duty to make appropriate findings as to the employer's motive. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Quoted in Graf v. West Va. Univ., 189 W. Va. 214, 429 S.E.2d 496 (1992); Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 430 S.E.2d 331 (1993); Kincell v. Superintendent of Marion County Schools, 499 S.E.2d 862 (W. Va. 1997).

Cited in Weimer-Godwin v. Board of Educ., 179 W. Va. 423, 369 S.E.2d 726 (1988); Sexton v. Marshall Univ., 182 W. Va. 294, 387 S.E.2d 529 (1989); Harrison County Bd. of Educ. v. Carson-Leggett, 195 W. Va. 596, 466 S.E.2d 447 (1995); Graf v. University of W. Va., 504 S.E.2d 654 (W. Va. 1998).

18-29-3. Grievance procedure generally.

(a) A grievance must be filed within the times specified in section four [§ 18-29-4] of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten [§ 18A-4-10], article four, chapter eighteen-a of this code. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing. If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with

the law and to make the grievant whole.

(b) If the employer or agent intends to assert the applicability of any statute, policy, rule, regulation or written agreement or submits any written response to the filed grievance at any level, a copy thereof shall be forwarded to the grievant and any representative of the grievant so named in the filed grievance. Anything so submitted and the grievant's response thereto, if any, shall become part of the record. Failure to assert such statute, policy, rule, regulation or written agreement at any level shall not prevent the subsequent submission thereof in accordance with the provisions of this subsection.

(c) The grievant may file the grievance at the level vested with the authority to grant the requested relief if the grievance evaluator at that level agrees in writing thereto. In the event a grievance is filed at a higher level, the employer shall provide copies to each lower administrative level.

(d) An employee may withdraw a grievance at any time by notice, in writing, to the level wherein the grievance is then current. Such grievance may not be reinstated by the grievant unless such reinstatement is granted by the grievance evaluator at the level where the grievance was withdrawn. If more than one employee is named as grievant in a particular grievance, the withdrawal of one employee shall not prejudice the rights of any other employee named in the grievance. In the event a grievance is withdrawn or an employee withdraws from a grievance, such employer shall notify in writing each lower administrative level.

(e) Grievances may be consolidated at any level by agreement of all parties.

(f) An employee may have the assistance of one or more fellow employees, an employee organization representative or representatives, legal counsel or any other person in the preparation and presentation of the grievance. At the request of the grievant, such person or persons may be present at any step of the procedure, as well as at any investigative meeting or other meeting which is held with the employee for the purpose of discussing the possibility of disciplinary action. When a fellow employee is assisting a grievant, the employee shall do so without loss of pay and shall have protection from reprisal as that term is defined in section two [§ 18-29-2] of this article.

(g) If a grievance is filed which cannot be resolved within the time limits set forth in section four [§ 18-29-4] of this article prior to the end of the employment term, the time limit set forth in said section shall be reduced as agreed to in writing by both parties so that the grievance procedure may be concluded within ten days following the end of the employment term or an otherwise reasonable time.

(h) No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.

(i) Except for the informal attempt to resolve the grievance as provided for in subsection (a), section four [§ 18-29-4(a)] of this article, decisions rendered at all levels of the grievance

procedure shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and shall be transmitted within the time prescribed to the grievant and any representative named in the grievance. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made.

(j) Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same; the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitations for filing the new grievance shall be measured from the date of such ruling.

(k) Any change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner.

(*l*) Forms for filing grievances, giving notice, taking appeals, making reports and recommendations, and all other necessary documents shall be made available by the immediate supervisor to any employee upon request. Such forms shall include information as prescribed by the board. The grievant shall have access to the institution's equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of such equipment.

(m) Notwithstanding the provisions of section three [§ 6-9A-3], article nine-a, chapter six of this code, or any other provision relating to open proceedings, all conferences and hearings pursuant to this article shall be conducted in private except that, upon the grievant's request, conferences and hearings at levels two and three shall be public. Within the discretion of the hearing examiner, conferences and hearings may be public at level four.

(n) No person or governing board to which appeal has been made shall confer or correspond with a grievance evaluator at a previous level or a management representative who recommended or approved the grieved action regarding the merits of the grievance unless all parties to the grievance are present.

(o) Grievances may be processed at any reasonable time, but attempts shall be made to process the grievance on work time in a manner which does not interfere with the normal operation of the institution. Grievances processed on work time shall not result in any reduction in salary, wages, rate of pay or other benefits of the employee and shall be counted as time worked.

Should any employer or the employer's agent cause a conference or hearing to be postponed without adequate notice to employees who are scheduled to appear during their normal work day, such employees will not suffer any loss in pay for work time lost.

(p) Any grievance evaluator may be excused from participation in the grievance process for reasonable cause, including, but not limited to, conflict of interest or incapacitation, and in such

case the grievance evaluator at the next higher level shall designate an alternate grievance evaluator if such is deemed reasonable and necessary.

(q) No less than one year following resolution of a grievance at any level, the grievant may by request in writing have removed any record of the grievance from any file kept by the employer.

(r) All grievance forms and reports shall be kept in a file separate from the personnel file of the employee and shall not become a part of such personnel file, but shall remain confidential except by mutual written agreement of the parties.

(s) The number of grievances filed against an employer or agent or by an employee shall not, per se, be an indication of such employer's or agent's or such employee's job performance.

(t) Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in section four [§ 18-29-4] of this article and provided both parties in section seven [§ 18-29-7] of this article.

(u) Upon a timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties.

(v) The doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriate relief for a period of one year prior to the filing of a grievance based upon a continuing practice.

[1985, c. 71; 1992, c. 62.]

Raising of default issue - In order to benefit from the "relief by default" provisions in subsection (a), the grieved employee must raise the default issue as soon as the employee becomes aware of such default. Hanlon v. Logan County Bd. of Educ., 496 S.E.2d 447 (W. Va. 1997).

Mandatory time period for filing grievance - Subsection (a) makes mandatory the time periods within which grievances must be filed, heard and decided; consequently, failure to comply will result in default judgment for the grievant unless one of the enumerated statutory exceptions applies. Hattman v. Darnton, 497 S.E.2d 348 (W. Va. 1997).

Under subsection (a) of this section, the 5-day period within which an employer may seek a level four hearing regarding a default in favor of a grievance based on the failure of a grievance evaluator to make a required response is triggered by the employer's receipt of a written notice of the default. Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999).

Timeliness of hearing - Substitute teacher substantially complied with the grievance procedure where he spoke with the director of personnel and filed a grievance with the principal of the school where the

event he complained of occurred; thus, he was entitled to default judgment where he did not receive a hearing in two years. State ex rel. Catron v. Raleigh County Bd. of Educ., 496 S.E.2d 444 (W. Va. 1997).

Misinterpretation or misapplication of statutes - Duty to file grievance - When there is a misinterpretation or misapplication of a statute involving school personnel, the employee affected by the misinterpretation or misapplication of the law has no duty to file a grievance until the misinterpretation or misapplication occurs. State ex rel. Monk v. Knight, 499 S.E.2d 35 (W. Va. 1997).

Intervention. - An intervenor in a grievance proceeding under this article may make affirmative claims for relief as well as assert defensive claims. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

Subdivision (u) of this section is similar to the language of W. Va. R. Civ. P. 24 and Fed. R. Civ. P. 24, which allow a person to intervene of right in a civil action; because of this similarity, the jurisprudence applying and interpreting those rules may be helpful on the issue of what claims may be made by an intervenor in proceedings arising under this article. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

Pursuant to subsection (u), a teacher employed by a county board of education may intervene in a grievance proceeding at any level if that teacher believes the disposition of the grievance will adversely affect his or her rights or property or if that teacher believes his or her interest is not adequately represented by the existing parties. State ex rel. Monk v. Knight, 499 S.E.2d 35 (W. Va. 1997).

Limit on claims of intervenor. - A hearing examiner in a grievance proceeding under this article may for good cause and in the cautious exercise of the examiner's discretion limit the claims that an intervenor may make; however, such limitations must be imposed in a fashion that will not unfairly prejudice the rights of the intervenor to have a proper determination made on the merits of his or her claims. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

Appeal. - A county board of education or its superintendent may appeal a grievance decision made by the superintendent's designee at level two or by an independent hearing examiner at level four. Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992).

Applied in Flint v. Board of Educ., - W. Va. - , 531 S.E.2d 76 (W. Va. 1999), *this is a per curiam opinion.*

Quoted in Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Vest v. Board of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Ewing v. Board of Educ., 503 S.E.2d 541 (W. Va. 1998); Black v. State Consol. Public Retirement Bd., 505 S.E.2d 430 (W. Va. 1998).

Cited in Parsons v. West Virginia Bureau of Emp. Programs, 189 W. Va. 107, 428 S.E.2d 528 (1993); Copley v. Mingo County Bd. of Educ., 195 W. Va. 480, 466 S.E.2d 139 (1995).

18-29-4. Procedural levels and procedure at each level.

(a) Level one.

(1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.

(2) The immediate supervisor shall respond to the grievance within ten days of the conference.

(3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

(4) The immediate supervisor shall state the decision to such filed grievance within ten days after the grievance is filed.

(b) Level two.

Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing in accordance with section six [§ 18-29-6] of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing. Such decision may affirm, modify or reverse the decision appealed from. Level four hearing examiners or the chief administrator shall have the authority to subpoena witnesses and documents for level two and level three hearings in accordance with the provision of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, and may issue a subpoena upon the written request of any party to the grievance.

(c) Level three.

Within five days of receiving the decision of the chief administrator, the grievant may appeal the decision to the governing board of the institution or may proceed directly to level four. An appeal to the governing board shall set forth the reasons why the grievant is seeking a level three review of the decision of the chief administrator. Within five days of receiving the appeal, such governing board may conduct a hearing in accordance with section six of this article, may review the record submitted by the chief administrator and render a decision based on such record or may waive the right granted herein and shall notify the grievant of such waiver. Any decision by the governing board, including a decision to waive participation in the grievance, shall be in writing and shall set forth the reasons for such decision, including the decision to waive participation in the grievance. If a hearing is held under the provisions of this subsection, the governing board shall issue a decision affirming, modifying or reversing the decision of the chief administrator within five days of such hearing.

(d) Level four.

(1) If the grievant is not satisfied with the action taken by the chief administrator or, if appealed to level three, the action taken by the governing board, within five days of the written

decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided for in section five [§ 18-29-5] of this article, such hearing to be conducted in accordance with section six of this article within ten days following the request therefor: Provided, That such hearing may be held within thirty days following the request or within such time as is mutually agreed upon by the parties, if the hearing examiner gives reasonable cause, in writing, as to the necessity for such delay.

(2) Within thirty days following the hearing, the hearing examiner shall render a decision in writing to all parties setting forth findings and conclusions on the issues submitted. Subject to the provisions of section seven of this article, the decision of the hearing examiner shall be final upon the parties and shall be enforceable in circuit court.

All information and data generated by the board and in its custody relative to level four decisions and copies of such decisions shall be provided at reasonable cost to any individual requesting it.

[1985, c. 71; 1992, c. 62; 1995, c. 99.]

W. Va. Law Review. "Survey of Developments in West Virginia Law: 1985," 88 W. Va. L. Rev. 293 (1985).

Legislative intent. - The legislature did not intend the grievance process to be a procedural quagmire where the merits of the cases are forgotten. In many instances, the grievant will not have a lawyer; therefore, the process should remain relatively simple. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Participants at conferences. - A level I grievance conference does not involve the presence of persons other than the grievant and the immediate supervisor. Sexton v. Marshall Univ., 182 W. Va. 294, 387 S.E.2d 529 (1989).

Timeliness. - The timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

Discovery rule. - Subdivision (a)(1) contains a discovery rule exception to the time limits for instituting a grievance. Under this exception, the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a grievance. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

A grievance can extend to prior years because the discovery rule exception contained in subdivision (a)(1), in effect, tolls the limitation as to those prior years. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Continuing violation. - Unlawful employment discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc., is a "continuing violation," so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations. Therefore, a disparate-treatment employment discrimination complaint based upon allegedly unlawful compensation disparity is timely brought if it is filed within the statutory limitation period after such compensation disparity

last occurred. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

A grievance asserting that there was a present violation of § 18A-4-5b because the board of education was not providing uniform vacation benefits to its employees was timely where the alleged violation continued up until the date of the filing; the grievance was timely because the board's failure to provide uniform contracts to similarly situated employees, although a practice that had begun some years before, constituted a continuing practice. Flint v. Board of Educ., - W. Va. - , 531 S.E.2d 76 (W. Va. 1999), *this is a per curiam opinion.*

Continuing damage. - Inadvertent failure of school board to include teachers on a list for supplemental pay was a single act that caused continuing damage, in the form of a wage deficit. Continuing damage ordinarily does not convert an otherwise isolated act into a continuing practice, and once teachers learned about the pay discrepancy, they had an obligation to initiate the grievance procedure. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990).

Effect of intervention on time periods. - Intervention should not be permitted to unfairly circumvent the time periods applicable to the grievance process. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997).

Claim barred by limitations period. - The court was not clearly wrong in concluding that a claim was barred because it was filed more than 15 days after the grievance event, as the event that triggered the running of the limitations period was found to be the April 6 letter of the superintendent of schools notifying appellants of the board's decision rather than the June 7 memorandum notifying the appellants of the new schedule. Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997).

Default judgment granted - Substitute teacher substantially complied with the grievance procedure where he spoke with the director of personnel and filed a grievance with the principal of the school where the event he complained of occurred; thus, he was entitled to default judgment where he did not receive a hearing in two years. State ex rel. Catron v. Raleigh County Bd. of Educ., 496 S.E.2d 444 (W. Va. 1997).

Appeal. - A county board of education or its superintendent may appeal a grievance decision made by the superintendent's designee at level two or by an independent hearing examiner at level four. Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992).

Hearing examiners. - Under § 18-29-5(a), the grievance board is created and is directed to employ hearing examiners to conduct and decide level IV hearings, as provided in this section. Vest v. Board of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Waiver. - Where grievant agreed to continuance of a rescheduled hearing, grievant waived her statutory right under this section to have the grievance hearing held within five days of previously rescheduled hearing. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Misclassification. - This section allows employees to contest a misclassification at any time, although only once, and any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Applied in Putnam County Bd. of Educ. v. Andrews, 198 W. Va. 403, 481 S.E.2d 498 (1996); Barthelemy v. West Virginia Div. of Cors., - W. Va. - , 535 S.E.2d 201 (W. Va. 2000).

Quoted in Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); Putnam County Bd. of Educ. v. Andrews, 198 W. Va. 403, 481 S.E.2d 498 (1996); Hazelwood v. Mercer County Bd. of Educ., 200 W. Va. 205, 488 S.E.2d 480 (1997); Hanlon v. Logan County Bd. of Educ., 496 S.E.2d 447 (W. Va. 1997); Hattman v. Darnton, 497 S.E.2d 348 (W. Va. 1997).

Cited in Duruttya v. Board of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989); Bledsoe v. Wyoming County Bd. of Educ., 183 W. Va. 190, 394 S.E.2d 885 (1990); Board of Educ. v. Bowers, 183 W. Va. 399, 396 S.E.2d 166 (1990); Brown v. Wood County Bd. of Educ., 184 W. Va. 205, 400 S.E.2d 213 (1990); Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Parsons v. West Virginia Bureau of Emp. Programs, 189 W. Va. 107, 428 S.E.2d 528 (1993); Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999).

18-29-5. Education and state employees grievance board; hearing examiners.

(a) The education and state employees grievance board shall consist of three members who are citizens of the state appointed by the governor by and with the advice and consent of the Senate for overlapping terms of three years. No two members may be from the same congressional district, and no more than two of the appointed members may be from the same political party. No person may be appointed to membership on the board who is a member of any political party executive committee or holds any other public office or public employment under the federal government or under the government of this state. Members are eligible for reappointment, and any vacancy on the board shall be filled within thirty days of the vacancy by the governor by appointment for the unexpired term.

A member of the board may not be removed from office except for official misconduct, incompetence, neglect of duty, gross immorality or malfeasance, and then only in the manner prescribed in article six [§§ 6-6-1 et seq.], chapter six of this code for the removal by the governor of the state elected officers.

The board shall hold at least two meetings yearly at times and places as it may prescribe and may meet at other times as may be necessary, the other meetings to be agreed to in writing by at least two of the members. The compensation for members of the board is seventy-five dollars for each calendar day devoted to the work of the board, but not more than seven hundred fifty dollars during any one fiscal year. Each member shall be reimbursed for all reasonable and necessary expenses actually incurred in the performance of board duties, but shall submit a request for reimbursement upon a sworn itemized statement.

The board shall administer the grievance procedure at levels two, three and four, as provided in section five [§ 29-6A-5], article six-a, chapter twenty-nine of this code, and as provided for in section four [§ 18-29-4] of this article and shall employ at least two full-time hearing examiners on an annual basis and clerical help as is necessary to implement the legislative intent expressed in section one of this article.

In addition to the authorization granted by this section over education employees, the board has jurisdiction over the procedures to be followed in processing grievances filed under article six-a [§§ 29-6A-1 et seq.], chapter twenty-nine of this code.

The board shall hire hearing examiners who reside in different regional educational service agency areas unless and until the number of hearing examiners exceeds the number of the areas, at which time two hearing examiners may be from the same area. If a grievant previously before a

hearing examiner again brings a grievance, a different hearing examiner is required to hear the grievance upon written request therefor by any party to the grievance. These hearing examiners serve at the will and pleasure of the board.

The board shall submit a yearly budget and shall report annually to the governor and Legislature regarding receipts and expenditures, number of level four hearings conducted, synopses of hearing outcomes and other information as the board determines appropriate. The board shall further evaluate on an annual basis the level four grievance process and the performance of all hearing examiners and include the evaluation in the annual report to the governor and Legislature. In making the evaluation, the board shall notify all institutions, employee organizations and all grievants participating in level four grievances in the year for which evaluation is being made and shall provide for the submission of written comment or the hearing of testimony regarding the grievance process, or both. The board shall provide suitable office space for all hearing examiners in space other than that utilized by any institution as defined in section two of this article and shall ensure that reference materials are generally available.

The board is authorized to promulgate rules consistent with the provisions of this article; the rules shall be adopted in accordance with chapter twenty-nine-a [§§ 29A-1-1 et seq.] of this code.

(b) Hearing examiners may consolidate grievances, allocate costs among the parties in accordance with section eight [§ 18-29-8] of this article, subpoena witnesses and documents in accordance with the provisions of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, provide relief found fair and equitable in accordance with the provisions of this article, and exercise other powers as provides for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article.

[1985, c. 71; 1989, c. 64; 1998, c. 160.]

Cross References. Grievance procedure for state employees, §§ 29-6A-1 et seq.

Education employees grievance board renamed education and state employees grievance board, § 29-6A-5.

Effect of Amendment of 1998 The amendment, effective July 1, 1998, in the section heading, inserted "and state"; in (a), inserted the fifth paragraph; also in (a), in the first pargraph, rewrote the first sentence, in the third paragraph, substituted "The compensation for members of the board is" for "Members of the board shall each be paid," and substituted "for reimbursement" for "therefor," rewrote the fourth paragraph, in the seventh paragraph, substituted "determines" for "may deem," in the eighth paragraph, twice deleted "and regulations" following "rules," and inserted "shall" preceding "be adopted"; and in (b), substituted "may consolidate" for "are hereby authorized and shall have the power to consolidate," "found fair" for "as is deemed fair," and "exercise other powers as provides" for "such other powers as will provide," and deleted "or regulations" following "rules"; substituted "may," "is," "are" or a variation thereof for "shall" or a variation thereof throughout; and made stylistic changes.

W. Va. Law Review. "Survey of Developments in West Virginia Law: 1985," 88 W. Va. L. Rev. 293 (1985).

Notice of right to request level four hearing. - The notice which advises the petitioner of his right to request a level four hearing must include instructions on where this request is to be filed. Duruttya v. Board

of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989).

Discretion. - The legislature intended to give the examiners who hear grievances the power to fashion any relief they deem necessary to remedy wrongs done to educational employees by state agencies, limited by law and by both the United States Constitution and the state constitution. Graf v. West Va. Univ., 189 W. Va. 214, 429 S.E.2d 496 (1992).

Hearing examiners. - Under subsection (a), the grievance board is created and is directed to employ hearing examiners to conduct and decide level IV hearings, as provided in § 18-29-4. Vest v. Board of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

18-29-6. Hearings generally.

The chief administrator or his or her designee, the governing board or the hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved, to cross examine and to rebut evidence. Notice of a hearing shall be sent to all parties and their named representative and shall include the date, time and place of the hearing.

The institution that is party to the grievance shall produce prior to such hearing any documents, not privileged, and which are relevant to the subject matter involved in the pending grievance, that has been requested by the grievant, in writing.

The superintendent, the president of the state or county board of education or the state or county board member designated by such president, the executive director of the regional educational service agency, the director of the multi-county vocational center, the chancellor of the higher education governing boards, the president of any state institution of higher education, the senior administrator, the chief administrator or his or her designee, each member of the governing board or the hearing examiner shall have the power to (1) administer oaths and affirmations, (2) regulate the course of the hearing, (3) hold conferences for the settlement or simplification of the issues by consent of the parties, (4) exclude immaterial, irrelevant or repetitious evidence, (5) sequester witnesses, (6) restrict the number of advocates, and take any other action not inconsistent with the rules and regulations of the board or the provisions of this article.

All the testimony and evidence at any hearing shall be recorded by mechanical means, and all recorded testimony and evidence at such hearing shall be transcribed and certified at the request of any party to the institution or board. The institution shall be responsible for promptly transcribing the testimony and evidence and for providing a copy of the certified transcription to the party requesting same. The institution shall be responsible for all costs relating to preparation and duplication of the transcript. The hearing examiner may also request and be provided a transcript upon appeal to level four and allocate the costs therefor as prescribed in section eight [§ 18-29-8] of this article.

Formal rules of evidence shall not be applied, but parties shall be bound by the rules of privilege recognized by law. In any grievance involving disciplinary or discharge actions, no

employee may be compelled to testify against himself or herself, the burden of proof is on the employer, and the employer shall present its case first.

All materials submitted in accordance with section three [§ 18-29-3] of this article; the mechanical recording of all testimony and evidence or the transcription thereof, if any; the decision; and any other materials considered in reaching the decision shall be made a part and shall constitute the record of a grievance. Such record shall be submitted to any level at which appeal has been made, and such record shall be considered, but the development of such record shall not be limited thereby.

Every decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusions of law. Prior to such decision any party may propose findings of fact and conclusions of law.

[1985, c. 71; 1992, c. 62.]

Rules of evidence. - Although formal rules of evidence do not apply to grievance procedures under this article, nolo contendere pleas are nevertheless unreliable as evidence of guilt of particular acts in a subsequent grievance or other administrative proceeding. University of W. Va. Bd. of Trustees ex rel. W. Va. Univ. v. Fox, 197 W. Va. 91, 475 S.E.2d 91 (1996).

Quoted in Woo v. Board of Educ., 504 S.E.2d 644 (W. Va. 1998).

Cited in Hattman v. Darnton, 497 S.E.2d 348 (W. Va. 1997).

18-29-7. Enforcement and reviewability.

The decision of the hearing examiner shall be final upon the parties and shall be enforceable in circuit court: Provided, That either party may appeal to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Such appeal shall be filed in the circuit court of Kanawha County or in the circuit court of the county in which the grievance occurred within thirty days of receipt of the hearing examiner's decision. The decision of the hearing examiner shall not be stayed, automatically, upon the filing of an appeal, but a stay may be granted by the circuit court upon separate motion therefor.

The court's ruling shall be upon the entire record made before the hearing examiner, and the court may hear oral arguments and require written briefs. The court may reverse, vacate or modify the decision of the hearing examiner or may remand the grievance to the chief administrator of the institution for further proceedings.

[1985, c. 71.]

Exhaustion of administrative remedies. - Circuit court correctly ruled it was without jurisdiction to resolve a compensation dispute between school faculty and board of education, where faculty failed to exhaust their administrative remedies. Kincell v. Superintendent of Marion County Schools, 499 S.E.2d 862 (W. Va. 1997).

Decision not clearly wrong. - Determination of administrative law judge that teacher did not touch student on buttocks but on side was not clearly wrong and was allowed to stand, where judge was present during all testimony and was able to perceive witness demonstrations first-hand. Kanawha County Bd. of Educ. v. Hayes, 500 S.E.2d 547 (W. Va. 1997).

Standard of review. - Judicial review of a hearing examiner's decision under this section is similar to the standard of review under the Administrative Procedure Act, § 29A-5-4, in that both require that evidentiary findings made at an administrative hearing not be reversed unless they are clearly wrong. Randolph County Bd. of Educ. v. Scalia, 182 W. Va. 289, 387 S.E.2d 524 (1989)In accord with Randolph County Bd. of Educ. v. Scalia.

A final order of the hearing examiner for the West Virginia Educational Employees Grievance Board, made pursuant to this section, and based upon findings of fact, should not be reversed unless clearly wrong. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994); Putnam County Bd. of Educ. v. Andrews, 198 W. Va. 403, 481 S.E.2d 498 (1996); Keatley v. Mercer County Bd. of Educ., 200 W. Va. 487, 490 S.E.2d 306 (1997).

A final order of the hearing examiner for the West Virginia education and state employee grievance board, made pursuant to §§ 29-6A-1, et seq., and based upon findings of fact, should not be reversed unless clearly wrong. Quinn v. West Va. N. Community College, 197 W. Va. 313, 475 S.E.2d 405 (1996); Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997).

Supreme court review. - The supreme court reviews de novo the conclusions of law and application of law to the facts. Holmes v. Board of Educ., 206 W. Va. 534, 526 S.E.2d 310 (1999).

Court not to substitute judgment for that of examiner. - A court may set aside a decision of a hearing examiner for the board if it is arbitrary, capricious, an abuse of discretion, or contrary to law; the scope of review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

Where decision relies on interpretation of law. - Where an administrative law judge's decision relies on an interpretation of the law, a circuit court has the ability to reverse the decision if it is contrary to law. Putnam County Bd. of Educ. v. Andrews, 198 W. Va. 403, 481 S.E.2d 498 (1996).

Effect of precedence. - An administrative law judge's ruling could be set aside on the grounds that it was contrary to an opinion rendered by the State Superintendent of Schools in 1996 even though the office of the State Superintendent had rendered a conflicting opinion in 1989 since the most recent opinion was controlling. Board of Educ. v. Smith, 502 S.E.2d 214 (W. Va. 1998), *this is a per curiam opinion*.

Scope of review. - The circuit court's scope of review of a hearing examiner's decision in a grievance case is limited to the five grounds enumerated in this section. Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).

Applied in Sexton v. Marshall Univ., 182 W. Va. 294, 387 S.E.2d 529 (1989); Board of Educ. v. Johnson, 497 S.E.2d 778 (W. Va. 1997); Graf v. University of W. Va., 504 S.E.2d 654 (W. Va. 1998); University of W. Va. Bd. of Trustees ex rel. W. Va. Univ. v. Graf, 205 W. Va. 118, 516 S.E.2d 741 (1999), *this is a per curiam opinion*; Mercer County Board of Educ. v. Townsend, - W. Va. - , 531 S.E.2d 664 (W. Va. 2000); Cahill v. Mercer County Bd. of Educ., - W. Va. - , 539 S.E.2d 437 (W. Va. 2000).

Quoted in Board of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); Cahill v. Mercer County Bd. of Educ., 195 W. Va. 453, 465 S.E.2d 910 (1995); Copley v. Mingo County Bd. of Educ., 195 W. Va. 480, 466 S.E.2d 139 (1995); Ewing v. Board of Educ., 503 S.E.2d 541 (W. Va. 1998); Maikotter v. University of W. Va. Bd. of Trs., 206 W. Va. 691, 527 S.E.2d 802 (1999).

Stated in Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988); Woo v. Board of Educ., 504 S.E.2d 644 (W. Va. 1998); Flint v. Board of Educ., - W. Va. - , 531 S.E.2d 76 (W. Va. 1999), *this is a per curiam opinion*.

Cited in Board of Educ. v. DeFazio, 180 W. Va. 614, 378 S.E.2d 656 (1989); Duruttya v. Board of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989); Townshend v. Board of Educ., 183 W. Va. 418, 396 S.E.2d 185 (1990); Brown v. Wood County Bd. of Educ., 184 W. Va. 205, 400 S.E.2d 213 (1990); Robbins v. McDowell County Bd. of Educ., 186 W. Va. 141, 411 S.E.2d 466 (1991); Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Parsons v. West Virginia Bureau of Emp. Programs, 189 W. Va. 107, 428 S.E.2d 528 (1993); Berry v. Kanawha County Bd. of Educ., 191 W. Va. 422, 446 S.E.2d 510 (1994); Ohio County Bd. of Educ. v. Hopkins, 193 W. Va. 600, 457 S.E.2d 537 (1995); Watts v. West Va. Dep't of Health & Human Resources/Division of Human Servs., 195 W. Va. 430, 465 S.E.2d 887 (1995); Roach v. Regional Jail Auth., 198 W. Va. 694, 482 S.E.2d 679 (1996).

18-29-8. Allocation of costs.

Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses except as to the costs of transcriptions as provided for in section six [§ 18-29-6] of this article.

In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee or the organization representing the employee is entitled to recover court costs and reasonable attorney fees, to be set by the court, from the employer.

[1985, c. 71; 1992, c. 62.]

Quoted in University of W. Va. Bd. of Trustees ex rel. W. Va. Univ. v. Graf, 205 W. Va. 118, 516 S.E.2d 741 (1999), *this is a per curiam opinion*.

Applied in Maikotter v. University of W. Va. Bd. of Trs., 206 W. Va. 691, 527 S.E.2d 802 (1999).

Cited in Putnam County Bd. of Educ. v. Andrews, 198 W. Va. 403, 481 S.E.2d 498 (1996).

18-29-9. Mandamus proceeding.

Any institution failing to comply with the provisions of this article may be compelled to do so by mandamus proceeding and shall be liable to any party prevailing against the institution for court costs and attorney fees, as determined and established by the court.

[1985, c. 71.]

Denial of writ of mandamus. - The power of boards of education relating to the hiring, assignment, transfer, and promotion of school personnel is discretionary, and, in line with general principles relating to the remedy of mandamus, it has been recognized that in the absence of fraud, partiality, arbitrary or capricious conduct, or some ulterior motive, a judgment of the county board of education with respect to the qualifications of an applicant will be given deference upon judicial scrutiny. Tenney v. Board of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990).

Denial of mandamus relief upheld where an employee turned down for an appointment failed to show that he was the most qualified for the position in question and where the record was devoid of a showing that the board's decision was motivated by fraud, partiality, capricious conduct, or other circumstance which would justify judicial interference with the board's exercise of its discretion. Tenney v. Board of Educ., 183 W. Va. 632, 398 S.E.2d 114 (1990).

18-29-10. Mediation.

To such extent as may be feasible with existing personnel and resources, the education employees grievance board shall attempt mediation and other alternative dispute resolution techniques to actively assist the parties in identifying, clarifying and resolving issues regarding the grievance at any time prior to the level four hearing.

All of the information that is provided by the parties during mediation shall remain confidential. Mediators shall not be called as witnesses to provide testimony in unresolved grievances that proceed to a grievance hearing, and any hearing examiner involved in a mediation process shall not hear the grievance nor be consulted regarding the merits of the grievance.

The education employees grievance board shall monitor the results of all mediation attempts and report to the Legislature prior to the first day of January, one thousand nine hundred ninety-three, regarding the feasibility of the process, the cost effectiveness of the process, the success of the process in resolving grievances, the resources which would be required to expand the process, and such other information or recommendations as the grievance board may deem appropriate and helpful.

[1992, c. 62.]

Effective Dates. Acts 1992, c. 62, provided that the act take effect ninety days from passage (Mar. 5, 1992).

18-29-11. Compilation and dissemination of data.

In addition to such other data as may be required under the provisions of this article, the education employees grievance board shall provide each governing board and employee organization, within thirty days of the end of each quarter, a statewide quarterly report summarizing matters decided by the hearing examiners during the preceding quarter. Each report shall set forth any information deemed to be helpful in providing an overview of grievance-related issues.

In addition to such other data as may be required under the provisions of this article, the education employees grievance board shall annually provide each county board of education, within thirty days of the end of each school year, a report specifying:

(1) The number of grievances against the county board which, during the school year, were appealed to level four, identifying each grievance by subject matter;

(2) The number of grievances against the county board which, during the school year, were granted, identifying each grievance by docket number, date of decision, and subject matter;

(3) The number of grievances against the county board which, during the school year, were denied, identifying each grievance by docket number, date of decision, and subject matter; and

(4) The number of grievances against the county board which, during the school year, were otherwise disposed of, identifying each grievance by disposition, docket number, date of decision, and subject matter.

Nothing contained in either the quarterly or annual report may breach the confidentiality of a grievant or other person, nor may any matter be disclosed if the disclosure may violate any provision of law. In each quarterly report, the grievance board shall make an effort to provide information applicable to particular counties, institutions or governing boards, as may be appropriate.

Each quarterly and annual report sent by the grievance board to a governing board shall then be distributed to each member of the governing board so that the governing board may monitor the significant personnel-related matters which came before the grievance board and thereby ascertain whether any personnel policies need to be reviewed, revised or enforced.

Each quarterly report shall be incorporated into the annual report required by section five [§ 18-29-5] of this article, which shall also be distributed to each governing board and employee organization.

[1992, c. 62; 2000, c. 110.]

Effect of Amendment of 2000 Acts 2000, c. 110, effective June 7, 2000, rewrote the section.

Cited in Barazi v. West Virginia State College, 498 S.E.2d 720 (W. Va. 1997); Cahill v. Mercer County Bd. of Educ., - W. Va. - , 539 S.E.2d 437 (W. Va. 2000).